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Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR APPELLEES SCHMULTS AND DINKINS

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BRIEF FOR APPELLEES SCHMULTS AND DINKINS

STATEMENT

This case presents the question of the constitutionality of a significant alteration in the way our government operates. The issues to be resolved cut across party and political lines and will affect the shape of our government not just today, and with respect to this Administration, but well into the future. To reverse the court of appeals and approve the independent counsel provisions of the Ethics in Government Act would be to endorse Congress's constitutionally impermissible rationale that the Executive may not be trusted to faithfully execute the laws. The inevitable result would be an unwarranted imbalance of power among the branches.

* * * *

On April 23, 1986, a special three-judge "court" acting pursuant to the Ethics in Government Act, 28 U.S.C. §§ 591 *et seq.* ("the Act"), named an independent counsel to conduct a criminal investigation into the activities of former Assistant Attorney General Theodore B. Olson. On May 29, 1986, the first independent counsel resigned, and the special court appointed Alexia C. Morrison to succeed him. The special court thereby purported to vest in Ms. Morrison all the prosecutorial authority and discretion of the Attorney General with respect to a certain range of activities, and to divest the President and the Attorney General of any power to participate in, guide, or control any aspect of her investigation. Appellant Morrison is one of several independent counsels who, together with their large staffs, currently purport to exercise the investigative and prosecutorial authority of the United States with respect to a broad and diverse range of activities. This case presents a constitutional challenge to appellant's authority to exercise that power pursuant to the Act.

Congressional Inquiries Into Superfund. The independent counsel's investigation is part of an ongoing and acrimonious confrontation between the Executive and

Legislative Branches that began in 1982, when two congressional oversight committees began an inquiry into the administration by the Environmental Protection Agency of the Hazardous Substance Response Fund known as "Superfund". J.S. 4a. During those investigations, the two committees requested and subpoenaed numerous internal documents from EPA. On the advice of the Department of Justice (DoJ), the EPA made certain documents available but withheld others, asserting that the withheld documents were privileged. After court proceedings—including an unprecedented suit brought by the Executive Branch against the Legislative Branch, *United States* v. *House of Representatives of the United States*, 556 F. Supp. 150 (D.D.C. 1983)—and lengthy negotiations, the Executive and the Legislature reached agreement on document production. J.S. 4a.

In the next Congress, the majority members of a subcommittee of the House Committee on the Judiciary began an investigation—unknown to many Committee members—into the conduct of the DoJ during the Superfund document controversy. J.S. 5a.[1] The results of the investigation were compiled in a 3,000-page report issued by majority members of the Committee over the vehement dissent of minority members. The report complained of actions by DoJ officials during both the Superfund investigation and the subsequent Judiciary Committee inquiry. The Judiciary Committee letter transmitting the report to the Attorney General requested that he conduct an inquiry and that he apply for an independent counsel under the provisions of the Ethics Act.[2]

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[1] *See also* Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83, H.R. Rep. No. 435, 99th Cong., 1st Sess. 731 (1985) (dissenting views).

[2] *See* Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report at 2 (April 10, 1986) ("Attorney General Report"). Appellant has lodged with this Court a copy of this Report and the other documents discussed in this section.

Actions of the Attorney General. The Attorney General concluded that the congressional report contained sufficient information to warrant "preliminary investigations" under 28 U.S.C. § 592 with respect to the following issues:

> (A) Whether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505, § 1001, or any other provision of federal criminal law;
>
> (B) Whether the conduct of former Deputy Attorney General Edward Schmults, resulting in the undisclosed withholding of documents from the House Judiciary Committee from March, 1983, through April, 1984, violated 18 U.S.C. § 1505, § 1001, § 1512 or any other provision of federal criminal law;
>
> (C) (1) Whether the conduct of former Assistant Attorney General Carol Dinkins, resulting in the undisclosed withholding of documents from the Judiciary Committee during its investigation, violated 18 U.S.C. § 1505, § 1001, § 1512, or any other provision of federal criminal law; and (2) whether the conduct of Mrs. Dinkins in preparing and submitting a declaration in the case captioned *United States* v. *United States House of Representatives*, Civil No. 82-3583 (D.D.C.), violated 18 U.S.C. § 1503, § 1621, § 1623, § 401, § 1001, § 1512, or any other provision of federal criminal law.

Attorney General Report at 2-5.

After an exhaustive inquiry and internal reviews, the Attorney General on April 10, 1986 requested the special

court to appoint an independent counsel to investigate the discrete allegation concerning Mr. Olson (set out in (A) above). *Id.* at 11. Consistent with the recommendation of senior DoJ official John C. Keeney, the Attorney General determined that there were no reasonable grounds to investigate Mr. Schmults and Ms. Dinkins further. *Id.* at 26, 47-48.

Initiation of the Olson Investigation. On April 23, 1986, the special court issued an Order appointing James C. McKay as independent counsel and defining his jurisdiction in broader terms than had been referred by the Attorney General. Order, Div. No. 86-1 (D.C. Cir., Div. for the Purpose of Appointing Independent Counsels, April 23, 1986). The court ordered Mr. McKay to investigate

> whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001 or any other provision of federal law.

Id. On its own initiative, the court also ordered that Mr. McKay

> shall have jurisdiction to investigate any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation.

Id. The special court's order expressly granted the independent counsel "all the powers and authority" provided by the Act. The independent counsel's investigation has continued since that date two years ago.

Request for Expanded Jurisdiction. On November 14, 1986, the independent counsel requested, in a letter to the Attorney General, that he refer to her the allegations in the congressional report against Mr. Schmults and Ms. Dinkins, as well as an ongoing investigation by the Department of Justice of Robert M. Perry, former General Counsel to the EPA. She also stated that "standing in isolation, as framed by your report, Mr. Olson's testimony of March 10, 1983, probably does not constitute a prosecutable violation of any federal criminal law, based on my present understanding of the evidence."

In a letter dated December 17, 1986, Deputy Attorney General Burns responded that the Attorney General would refer the ongoing Perry investigation to appellant but would deny her request to investigate Mr. Schmults and Ms. Dinkins. The letter emphasized that the Attorney General had concluded once before that there were no reasonable grounds warranting further investigation or prosecution, and that any "new evidence" on which appellant purported to rely either had previously been considered or did not change his position.

Appellant then turned to the special court and, without notice to Mr. Schmults or Ms. Dinkins, requested that the court refer to her the allegations against Mr. Schmults and Ms. Dinkins. The Attorney General opposed her application.

On April 2, 1987, the special court denied Ms. Morrison's Application. *In re Olson*, 818 F.2d 34 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987). The court first went out of its way to "uphold" the constitutionality of the Act. It then ruled that, as a matter of *statutory* construction, it did not have authority to refer allegations to an independent counsel for possible *prosecution* when the Attorney General twice had specifically determined that those allegations should not be pursued. *Id.* at 47. However, purporting to construe its original grant of jurisdiction, the court advised that "authority to investigate allegations and evidence that Theodore Olson was engaged in an unlawful conspiracy with others" was "implicit" in its initial grant of jurisdiction, and that appellant therefore had power to investigate whether appellee Olson's testimony "was part of a larger, concerted plan, including Mr. Schmults, Ms.

Dinkins or others, to obstruct or impede the Committee's investigation." *Id.* at 48.

Proceedings Below. In May and June 1987, the independent counsel caused the issuance of grand jury subpoenas upon the three appellees. J.A. 9-22. Appellees moved to quash the subpoenas on the ground that the independent counsel had no lawful authority to cause their issuance because the Ethics Act is unconstitutional. The district court rejected this argument. J.A. 19-26. In order to appeal that ruling, appellees refused to comply with the subpoenas and were held in contempt of court. J.S. 140a-148a. Appellees thereafter appealed the contempt orders. The court of appeals reversed, ruling, 2-1, that the Act is unconstitutional. J.S. 1a. This appeal followed.[3]

SUMMARY OF ARGUMENT

A. The independent counsel statute violates Article II of the Constitution. Although the independent counsel's responsibilities bear all the hallmarks of the prosecutorial authority entrusted by the Constitution to the Executive, appellant and her staff are not Executive Officers. Appellant was appointed by Judges and not by the President with the consent of the Senate, as required by the Appointments Clause, Article II, § 2, for a "superior" Executive Officer with her final authority. Even if appellant is an "inferior Officer", her appointment violates the Appointments Clause. Under the "excepting clause" of Article II, § 2, Congress may authorize the courts to appoint certain "inferior Officers," but appellant could not properly be appointed by a court because she exercises core Executive functions. The Act's removal provisions also violate Article II. Appellant is removable only for good cause, subject to review and reinstatement by the Judiciary, not by the President at will, as required for an Executive Officer exercising core Executive functions—particularly one who is subject to ongoing oversight by Congress and the Judges, not by the President and the Attorney General. In short, although the independent counsel and her staff are purporting to exercise Executive authority, they meet none of the constitutional criteria for the exercise of that authority.

[3] After appellees were held in contempt for failure to comply with the subpoenas, the Act was amended in several significant ways, only some of which were made applicable to ongoing investigations. This brief addresses, and the Court should consider, as did the court of appeals, the Act as it existed at the time of the contempt, in determining the validity of the contempt citations. *See* J.S. 53a n.41.

B. The method of appointing associate counsel under the Act also violates Article II, § 2 of the Constitution. Under the Appointments Clause, Officers of the United States who are not nominated by the President and confirmed by the Senate may be appointed *only* by the President, a Department Head, or a court of law. Associate counsel are Officers, whether inferior or superior, but they were appointed by the independent counsel, not in the manner prescribed by Article II. Under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the appointment of associate counsel is invalid.

C. The Act also violates Article III. Appellant derives her authority and her mandate from a "court" exercising unreviewable, non-judicial power in violation of Article III of the Constitution. Under authority of the Act, the special court has selected appellant as independent counsel; defined her prosecutorial jurisdiction, and, as a consequence, determined what power was to be removed from the Attorney General; issued an advisory order classifying appellant and her staff as employees of a "special agency" outside the Department of Justice; and ordered the release of internal DoJ documents over the objection of the Department. Neither the definition of a criminal investigation into all aspects of a citizen's life, nor the issuance of advisory opinions, is the appropriate business of Article III courts. The Act unconstitutionally forces upon judges not their customary duty

to make judicial decisions based on established precedent and rules of law in adversarial proceedings but, instead, the obligation to make political choices in which the rule of decision is personal opinion and *ex parte* contacts are the norm.

D. In recent decisions this Court has reasserted the Constitution's fundamental separation-of-powers principles and has rejected congressional encroachment on the exclusive powers of the Executive Branch. *See Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *See also United States* v. *Nixon*, 418 U.S. 683, 704 (1974). These cases reaffirm that a concentration of power in a single branch of government is unacceptable, and that an intrusion by one branch into the domain of another—including an effort by Congress, as here, to decrease Executive power and thereby aggrandize its own—must be avoided. Neither Congress nor the courts has the constitutional authority to prosecute criminal activity or to divest the Executive of its constitutional duty to prosecute. The independent counsel statute does just that, however, by removing from the Executive the exclusive authority to decide whom to prosecute and for what and by placing that authority instead in an Officer who is independent of the Executive with respect to selection, oversight, and removal. Even if not unlawful because of the appointment provisions, or removal provisions, or oversight provisions *on their own*, read as a whole the independent counsel statute is unconstitutional.

E. Lower courts uniformly have held that a motion to quash a subpoena is the proper vehicle for challenging the authority of a government attorney to appear before the grand jury and cause issuance of a subpoena. The motion presents a concrete case or controversy that is ripe for resolution. Appellant incorrectly argues that appellees' challenge is not ripe; in any event, she waived this claim by failing to raise it in the district court.

ARGUMENT

I. THE ACT VESTS IN THE INDEPENDENT COUNSEL POWER AND AUTHORITY BELONGING EXCLUSIVELY TO THE EXECUTIVE.

The independent counsel provisions of the Ethics Act vest in the independent counsel and her staff power and authority that are constitutionally entrusted to the Executive Branch alone. Her exercise of those powers cannot be sustained.

A. The Function of Prosecuting Offenses Against the United States Belongs Exclusively to the Executive.

Article II of the Constitution vests all Executive power in the President and commands him to "take Care that the Laws be faithfully executed." This clause confers on the Executive Branch the "exclusive authority and absolute discretion . . . to prosecute a case." *United States* v. *Nixon*, 418 U.S. at 693. In *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928), this Court observed, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them *or appoint the agents charged with the duty of such enforcement. The latter are executive functions.*" (Emphasis supplied). Fifty years later, in *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), this Court repeated that theme, asserting that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *See also id.* at 285 (White, J., concurring and dissenting) ("I would be much more concerned if Congress purported to usurp the functions of law enforcement. . . ."); *INS* v. *Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting) ("A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question."). As this Court noted recently,

> [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the de-

> cision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. *Chaney*, 470 U.S. 821, 832 (1985).

The decision whether and how to prosecute is necessarily affected by a variety of policy considerations, and the identification and weighing of competing policies and interests is committed to the exclusive discretion of the Executive.[4] Judgments as to the deterrence value of a prosecution, enforcement priorities, and the relationship of a given case to the government's overall enforcement plan, are entrusted by the Constitution to the Executive alone. So, too, are decisions on the legal position to take on issues that transcend a particular case; as the D.C. Circuit has noted, "a prosecutor may lawfully take account of many factors other than probable cause in making such decisions." *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974). "That the balancing of these permissible factors in individual cases is an executive, rather than a judicial, function follows from the need to keep the courts as neutral arbiters in the criminal law generally, . . . and from Art. II, § 3 of the Constitution, which charges the President to 'take care that the laws be faithfully executed.'" *Id.* (citing numerous cases). Not surprisingly, the decision not to prosecute, based as it necessarily must be on an amalgam of policy judgments entrusted to the Executive, is not subject to

[4] The Firth Circuit affirmed these principles in *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965), holding that the judiciary could not constitutionally encroach on the Executive Branch's discretion by ordering a prosecutor to prosecute a case in which the grand jury had returned an indictment. "It follows," the court said, "as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *Cox*, 342 F.2d at 171.

judicial review. *See Wayte* v. *United States*, 470 U.S. 598, 607-08 (1985). The "remedy for any dereliction of [a prosecutor's] duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people." *Pugach* v. *Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961).

The Executive's power to prosecute is complemented by its exclusive authority "to grant reprieves and pardons for offenses against the United States," Art. II, § 2, a power which "is not subject to legislative control." *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867). As Chief Justice Marshall explained, "A pardon is an act of grace, *proceeding from the power intrusted with the execution of the laws*, which exempts the individual . . . from the punishment the law inflicts for a crime he has committed." *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis supplied). When they granted the President this broad power to pardon, the Framers of course recognized the potential for abuse through favoritism or otherwise. Thus, after the pardon power was proposed, "Mr. Randolph moved to 'except cases of treason'. The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments." 2 *The Records of the Federal Convention of 1787*, at 626 (Farrand rev. ed. 1937). To that, Mr. Wilson responded: "Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted." *Id.*[5] To respond to this possibility of abuse, the Framers provided Congress not only with numerous checks on the

[5] Similarly, in a document entitled "Objections to This Constitution of Government," written on the blank pages of a draft of the Constitution, George Mason observed: "The President of the United States has the unrestrained power of granting pardons for treason, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." 2 *The Records of the Federal Convention of 1787*, at 639 (Farrand rev. ed. 1937).

Executive but also with the ultimate weapon of impeachment to invoke in the event of abuse, and they expressly withheld the power to pardon in the event of impeachment. This Court subsequently reaffirmed that, when necessary, impeachment, and *not* a "narrow and strained construction of the general powers of the President," *Ex Parte Grossman*, 267 U.S. 87, 121 (1925), is the proper recourse for a perceived abuse of the pardon power.

The same is true with respect to the power to execute the laws. The Constitution provides Congress with the impeachment power in the event the Executive abuses its power—as by giving favored treatment to targets of a criminal investigation in the face of conflicts of interest. Congress has no more authority to choose an alternate course, and to remove from the Executive the power to prosecute, in mere *anticipation* of abuses of that power, than it would to bar presidential exercise of the pardon power in the event of a perceived conflict of interest.

The Constitution squarely places in the Executive Branch alone the authority to prosecute offenses against the United States.[6] The power to make investigative

[6] This Court's recent decision in *Young* v. *United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124 (1987), makes clear that the Executive alone has the constitutional authority to prosecute and punish conduct proscribed as harmful by the general criminal laws. That case approved the practice of appointing private attorneys to prosecute criminal contempt cases because of the special nature of contempt, which is "designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 2133. Far from endorsing non-Executive Branch prosecution of conduct proscribed "by the general criminal laws," *id.*, the Court explicitly distinguished such cases—involving "execution of the criminal law in which only the executive branch may engage," *id.*—from contempt cases in which such prosecution would be permitted. This Court expressly limited its holding: "Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." *Id.* at 2134 n.10.

and prosecutorial decisions is a crucial component of the Executive's constitutional duty to take care that the laws are faithfully executed. Any congressional action that vests this power outside the Executive Branch violates the separation of powers.

B. The Act Vests in the Independent Counsel the Full Authority to Prosecute Offenses Against the United States.

The independent counsel provisions of the Ethics Act vest in the Court's appointee the full investigative and prosecutorial power of the Attorney General and the Department of Justice. In her capacity as independent counsel, appellant is effectively immune from Executive Branch scrutiny and control in her exercise of those powers. On all matters within the jurisdiction defined by the court, appellant may execute the laws in the name of the United States without any regard whatsoever for the policies or views of the Executive Branch.

While a single investigation might appear to divest the Executive of its authority only in a narrow area, the Ethics Act on its face authorizes a broad and unlimited incursion into—and consequent diminution of—Executive authority. The Act places no limit on the number of independent counsels who may be appointed at one time, on the duration of their tenure, or on the scope of their permissible jurisdiction—and it consequently places no limit on the extent to which the Executive may be divested of its authority. At this time, there are ongoing at least four public and some private investigations, in at least two of which the independent counsels have divested the Executive of ultimate authority over *both* prosecutorial decisionmaking and a slice of foreign affairs and national security decisionmaking.[7]

[7] As the court of appeals noted, the investigation of Independent Counsel Whitney North Seymour has placed him at odds with the Department of State and a foreign government whose representatives Mr. Seymour sought to subpoena. *See* J.S. 57a-58a.

[Continued]

A review of the statutory scheme highlights the breadth of these independent counsels' powers. By statute, Ms. Morrison has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General," 28 U.S.C. § 594(a). She is specifically empowered to conduct grand juries, engage in any necessary civil or criminal litigation, appeal any court decision, make determinations whether to contest any testimonial privilege, challenge any attempted withholding of evidence based on assertions of national security, apply to a court for immunity for witnesses, for subpoenas or for warrants, inspect tax returns, initiate prosecutions and sign indictments—in short, to handle all aspects of any case within her jurisdiction in the name of the United States. *Id.* Appellant may additionally have access to records and files of DoJ, and she has the entire staff of that Department at her beck and call. *Id.* § 594(d). She also has an unlimited budget and the discretion to appoint a staff of any size and composition to her liking. *Id.* § 594(c).

An independent counsel's most significant power is perhaps the decision whether to prosecute and, if so, for what. The assertion of *Amicus Curiae* (and Independent Counsel) Whitney North Seymour that this step is "ministerial," and that a referral by the Attorney General to the special court constitutes a "*policy* decision" by the Attorney General that "a prosecution should take place (if supported by the facts)," [8] is astonishing. Brief for

[7][Continued]

Other ongoing investigations or prosecutions involving alleged misconduct by officials covered by the Act necessarily involve classified information and require independent counsels to make critical decisions about disclosures of national security and classified information in the course of their prosecutions. The authority to weigh national security concerns against the value of a prosecution would otherwise be within the exclusive province of the President.

[8] Mr. Seymour ignores the many decisions he made, such as the number of counts to include in the indictment. He surely cannot

Whitney North Seymour at 14-15. The policy decision on *whether to prosecute* certainly is not made "when the Attorney General decides to file the application for appointment of Independent Counsel, . . ." *Id.* at 16. Under the Ethics Act, the Attorney General "shall apply" for the appointment of an independent counsel if, "upon completion of the preliminary investigation," he "finds reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592(c)(1). There is no room to consider the factors that normally go into the decision whether to prosecute, and no authority to employ the normal tools of investigation. *See* § 592(a)(2). Far from it, referral is mandatory,[9] and discretion whether to prosecute lies with the independent counsel, not the Attorney General.

Ostensible limits on the independent counsel are inconsequential. The Act states that the independent counsel "shall, *except where not possible*, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f) (emphasis supplied). Even if "written or other established policies" existed in any meaningful way, the provision has no teeth to it. By its terms it permits an independent counsel to ignore DoJ policies,[10] and it purports to provide no remedy for any

mean to suggest that the Attorney General, and not he, made the decision to include five counts in the indictment of Michael Deaver, thereby requiring that subpoenas be served on the Canadian Ambassador, or that such a decision, with significant diplomatic ramifications, is merely "ministerial."

[9] In contrast, *Amicus Curiae* Common Cause (at page 7) recognizes the mandatory character of the referral provision.

[10] As the court of appeals recounted, another independent counsel already has shown that he will freely ignore DoJ policies and guidelines, *see* J.S. 72a-73a. This is particularly troublesome in a case involving national security and classified information. Guidelines promulgated by the Attorney General pursuant to statute *require* a decision whether the potential damage to the national security that might result from the disclosure of classified in-

failure to adhere to them.[11] In any event, the "written or other established policies" of the Department cannot conceivably cover the numerous policy decisions that might affect the determination of whether or how to bring a particular prosecution. Finally, the written guidelines that exist "are replete with qualifiers, modifiers, provisos, exceptions and limitations, intermixed with buzzwords" amounting to a "mere precatory exhortation to be good and to be fair . . . ." *United States* v. *Shulman*, 466 F. Supp. 293, 299 (S.D.N.Y. 1979). They are cast in discretionary terms and give tremendous leeway to any person attempting to adhere to them.

In short, the Act lodges the full investigative and prosecutorial power of the Executive in the private individual appointed to serve as independent counsel. The result is an independent counsel who wields the "full machinery of the state," *Young* v. *Vuitton*, *supra*, 107 S. Ct. at 2141, and yet is uniquely unaccountable.

II. VESTING ULTIMATE RESPONSIBILITY FOR EXECUTIVE DECISIONS IN AN OFFICER APPOINTED BY A COURT VIOLATES ARTICLE II.

The President's power and duty to execute the laws must carry with it the right to choose the Officers who assist him. As this Court has held:

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided

formation outweighs other federal interests that would allegedly be furthered were the prosecution to proceed. *See Attorney General's Guidelines for Prosecutions Involving Classified Information*, promulgated pursuant to 18 U.S.C. App. IV § 12. Failure to adhere to such a policy obviously could have critical consequences.

[11] The U.S. Attorneys' Manual explicitly states that its guidelines are precatory only and confer no rights on individuals. *See* USAM § 1-1.100. Moreover, even the guidelines observe that the standards set forth therein are filled with discretion: "Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law." USAM § 9-27.110 (comment).

> could not execute the laws. He must execute them by the assistance of subordinates . . . As he is charged specifically to take care that they be faithfully executed, *the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him* under his direction in the execution of the laws."

Buckley v. *Valeo*, 424 U.S. at 135-36 (emphasis supplied) (quoting *Myers* v. *United States*, 272 U.S. 52, 117 (1926) (citations omitted)). Article II, § 2 of the Constitution expressly gives the appointment power to the President. It provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President's authority to select the Officers of the United States who will execute the laws is at the heart of the power constitutionally entrusted to him. Whatever control over those Officers might be removed from the Executive, in a quest for independence, this Court has repeatedly stressed that Officers executing the laws shall "not [be] independent of the Executive with respect to their appointments." *Buckley* v. *Valeo*, 424 U.S. at 136 (noting also that even with respect to the removal of heads of independent regulatory agencies, Court was dealing with an agency intended to be independent "*except in its selection.*") (emphasis in original). *See also Humphrey's Executor* v. *United States*, 295 U.S. 602, 625 (1935) (same). The appointment provision of the Act conflicts directly with this basic principle and is therefore unconstitutional.

A. Ultimate Responsibility for the Execution of the Laws Cannot Be Assigned to an Officer Appointed Other Than by the President With the Advice and Consent of the Senate.

An Officer who has ultimate responsibility for the execution of the laws is a "superior" Officer who must be appointed by the President with the advice and consent of the Senate and cannot constitutionally be appointed by a division of a court. *Buckley* v. *Valeo*, *supra*, establishes that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of [Article II]." In *Buckley*, this Court held that Federal Election Commissioners exercise "significant authority," that they are therefore Officers of the United States, and that Congress may not, consistently with the Constitution, appoint those Officers itself. As the independent counsel clearly exercises "significant authority," [12] Article II, § 2, cl. 2, controls her appointment.

Article II, § 2 establishes two classes of Officers of the United States. Certain Officers in the Executive Branch exercise sufficiently "significant authority" as to be "superior" or "principal" Officers whom the President constitutionally is required to appoint with the consent of the Senate.[13] Other "inferior Officers" operate in sub-

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[12] If there could be doubt on this issue, this Court's decision in *Buckley* v. *Valeo* would remove it. In that case, the Court held that statutory provisions vesting in Federal Election Commissioners the authority to conduct civil litigation to vindicate public rights rendered the commissioners "officers": "Such functions may be discharged only by persons who are 'Officers of the United States' within the language of [Article II, § 2]." 424 U.S. at 140.

[13] The term "superior" is used to distinguish Officers who must be appointed by the President with the advice and consent of the Senate from those "inferior Officers" who need not be so appointed. Although the term "superior" Officer does not appear in the Constitution, it is the term used by James Madison at the Constitutional Convention, *see infra* at 20-21, and by this Court in *United States* v. *Eaton*, 169 U.S. 331, 343 (1898), to describe such Officers.

ordinate positions and fall within the province of Article II's "excepting clause." [14] Congress may constitutionally delegate to the President, department heads, and courts of law the appointment of "inferior Officers," but it may not alter the method of appointing "superior" Officers. A threshold inquiry therefore is whether the independent counsel is a "superior" Officer who must be appointed by the President with the consent of the Senate, or whether she is an "inferior Officer" who may be otherwise appointed as provided in Article II's "excepting clause." [15] If she is a superior Officer under the Act, her appointment by a court is unconstitutional.

History and case law support the holding below that the independent counsel is a "superior" Officer who must be appointed by the President with the advice and consent of the Senate, and that the class of "superior" Officers is not limited to the Ambassadors, Consuls, Public Ministers, and Supreme Court Judges specifically mentioned in Article II, § 2, as appellant maintains (at pages 30-31).[16] The label "superior" Officer applies to a group

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[14] The "excepting clause" provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2.

[15] Employees, who are "lesser functionaries subordinate to officers of the United States," are outside the scope of Article II. *Buckley*, 424 U.S. at 126 n.162.

[16] After unsuccessfully arguing in the court of appeals that "superior" Officers are *solely* the Ambassadors, Public Ministers, Consuls and Supreme Court Judges named at the start of Article II, § 2, various *amici* have now altered their construction to include also those Officers in whom the power of appointment may be vested: the President, department heads, and courts of law. *See, e.g.*, Brief *Amicus Curiae* of Lawrence E. Walsh, Independent Counsel ("Walsh Brief") at 10; Brief for *Amicus Curiae* Public Citizen at 7. Even putting aside the curious suggestion that a "court of law" is an Officer, the contemporaneous debates demonstrate that the class of superior Officers is not so rigidly defined by reference to the

of Officers who exercise sufficient authority and discretion as to require the acquiescence of two branches of government in their selection. Indeed, the right of the Senate to withhold consent for any reason or no reason is one of the Constitution's several checks on Executive power, because it enables the Senate to "deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed." *Ex Parte Grossman*, 267 U.S. at 120. Like the distinction between Officers and employees at issue in *Buckley* v. *Valeo*, *supra*, the distinction between "superior" and "inferior Officers" is not defined by title or other formalistic rule. Instead, a substantive assessment of the authority and independence enjoyed by the Officer in question determines whether he is a "superior" Officer whose appointment is governed by Article II.

The "excepting clause"—providing for "inferior" Officers an exception to the prescribed method of appointing Officers—was added to Article II two days before adjournment of the Constitutional Convention. After the

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text as these briefs suggest. For example, in his Commentaries Joseph Story noted, "Whether the heads of departments are inferior officers, in the sense of the constitution, was much discussed in the debate on the organization of the department of foreign affairs, in 1789. *The result of the debate seems to have been that they were not.*" 2 J. Story, *Commentaries on the Constitution of the United States* § 1536, at 398 n.1 (3d ed. 1858) (emphasis supplied). *See also infra* at 20-24.

In any event, there is no reason to adopt the interpretation posited by these *amici*. The text certainly offers no reason to define superior Officers by reference solely to those named somewhere in the clause. In fact, the *sole* support for the textual argument is *dictum* in *United States* v. *Germaine*, 99 U.S. 508, 510 (1879). The issues in *Germaine* required no consideration of the distinction between superior and inferior Officers, and the Court would have had no occasion to consider the early commentaries (discussed in text) with which its passing remark, as construed by various *amici*, is so completely at odds. In fact, it is likely that the Court used the term "specially mentioned" to refer to what it had just called "the primary class"—those Officers who must be nominated by the President and confirmed by the Senate. *See* 99 U.S. at 509-10.

clause was proposed and seconded, James Madison observed:

> It does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.

2 *The Records of the Federal Convention of 1787*, at 627 (Farrand rev. ed. 1937).[17] This statement indicates that, within the broad category of Officers, the Framers envisioned a sub-category of superior Officers that included department heads as well as certain persons below them. As "superior" (as opposed to "inferior") Officers, those persons would not fall within the ambit of the excepting clause, but instead were to be appointed by the President with the consent of the Senate, as prescribed by the remainder of the section. Not surprisingly, the First Judiciary Act provided for presidential appointment *with the advice and consent of the Senate* not just of the Attorney General, but also of United States Attorneys—who are not specifically mentioned in Article II.[18] *See also United States* v. *Eaton*, 169 U.S. 331, 343-44 (1898) (in early periods of government, Officers "known as vice-consuls were appointed by the President and confirmed by the Senate, [and] the officials thus designated were . . . in reality principal officials.") (citations omitted); 2 J. Story, *Commentaries on the Constitution of the United States* § 1579, at 436 n.2 (1858) (quoting letter from Chief Justice Jay to George Washington).[19]

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[17] Governor Morris responded that "[t]here is no necessity. Blank Commissions can be sent—." 2 *The Records of the Federal Convention of 1787*, at 627 (Farrand rev. ed. 1937). Thereafter, on an equal vote, the motion to add the clause was lost. It then apparently was urged that the clause was too important to be omitted and, on a second vote, it was passed. *Id.*

[18] *See Parsons* v. *United States*, 167 U.S. 324, 337-44 (1897) (detailing history of appointment provisions regarding District Attorneys).

[19] Article II provides for presidential appointment (with the advice and consent of the Senate) of all Officers of the United States

Joseph Story similarly indicated that the answer whether Judges other than those of the Supreme Court are "inferior Officers" is not determined by the specific enumeration in the text of Article II but by a more substantive inquiry:

> Whether the judges of the inferior courts of the United States are such inferior officers as the Constitution contemplates to be within the power of Congress to prescribe the mode of appointment of, so as to vest in the President alone, or in the courts of law, or in the heads of departments, is a point upon which no solemn judgment has ever been had. The practical construction has uniformly been, that they are not such inferior officers.

2 J. Story, *Commentaries on the Constitution of the United States* § 1599, at 445 n.2 (1858). Most critically, Story noted that there is no clear line delineating inferior and superior Officers: "In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the Senate." *Id.* § 1536, at 397-98. There could scarcely be a more direct statement that the line between these classes may not be determined solely by reference to their enumeration in the text.

The determination as to whether an Officer is "superior" or "inferior" appropriately turns on a substantive evaluation of the appointee's duties, his powers, and the extent of his independence from control by superiors—the same factors that distinguish Officers from

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except as "herein otherwise provided"—that is, except as provided for elsewhere in the Constitution. The argument that the "herein" wording in Article II, § 2, refers to the Appointments Clause of Article II and not to the Constitution is belied both by the analysis of Justice Jay and by logic. It also is contrary to the history of the clause; since the excepting clause was added long after the rest of Article II, § 2 and the "herein" language, that language cannot possibly refer to the excepting clause.

employees. *See Buckley*, 424 U.S. at 126 and n.162; *see also id.* at 269-70 (White, J., concurring and dissenting). The appointee's title, of course, cannot be dispositive; nor is the determination of Congress as to the method of appointment, as *Buckley* makes clear. Appellant and various *amici* take issue with the court of appeals' ruling that, at a minimum, an Officer who has no superior is a principal Officer. Citations to dictionary definitions of the word "inferior" cannot mask the fact that independent counsels exercise *final* authority in the execution of the criminal laws, with a direct and often traumatic impact on the targets of that exercise of power. By any definition, such an Officer must be "principal," unless the sole criterion is title (*i.e.*, is the title in Article II?) or unless the decision whether an Officer is "inferior" is committed entirely to Congress. The former is implausible, since Congress then could create (as it has here) a new office to exercise powers of an existing principal Officer and thereby remove all Executive control. The latter, too, is implausible. To defer completely to Congress [20] would be to authorize Congress to remove from the Executive all authority to participate in the appointment of his "necessary agents." *Ex Parte Grossman, supra*, 267 U.S. at 120.[21]

At the same time, appellees Schmults and Dinkins submit that the dividing line between "superior" and "in-

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[20] *Amicus Curiae* American Bar Association relies (at pages 10-11) on the "as they think proper" language in the excepting clause for its textual argument that Congress has complete discretion to decide who is an "inferior Officer." A much more natural interpretation of that language is that Congress may alter the mode of appointment of "inferior Officers" to the extent "they think proper," not that Congress may define who is an "inferior Officer."

[21] If the Court agrees with the court of appeals that inter-branch appointments of "inferior Officers" are unconstitutional, the significance of the superior/inferior Officer distinction diminishes. If, however, this Court disagrees with that ruling, the need to maintain Executive appointment power over a class of key Officers becomes critical.

ferior" Officers is not simply whether the Officer has a superior, as the court of appeals might have suggested. It is clear that department heads are "superior" even though they have a "superior"—the President. Similarly, Ambassadors and consuls are unquestionably "superior" even though they are subordinate to the Secretary of State, and "inferior court" Judges also have been treated as "superior" Officers. The determination whether a particular Officer is a "superior" Officer will require in some cases a detailed analysis of the appointee's duties and powers, as well as the extent of his independence from control by superiors.[22] The categorization of the independent counsel is easy because of that Officer's unparalleled independence in wielding law enforcement power with respect to individual citizens.

The independent counsel created by the Ethics Act is a "superior" Officer. Within her jurisdiction she exercises the same power to hire and remove Officers and establish and implement Executive policy as is exercised in combination by the Attorney General and the more than two hundred Department of Justice officials who are appointed by the President with the advice and consent of the Senate. Indeed, since she is delegated the authority to make decisions *without any duty* to confer with Executive Branch Officers[23] or to abide by Executive Branch wishes, her power is perhaps more properly

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[22] This Court in *Buckley* v. *Valeo* implicitly rejected the textual analyses proposed by appellant when it held that, because of the significant authority the Federal Election Commissioners exercise, they are "at the very least" inferior Officers, 424 U.S. at 126, thereby leaving open the possibility that Commissioners are "superior" Officers. When the method of appointment was amended after *Buckley*, Congress provided that the Commissioners be appointed by the President *with the advice and consent of the Senate*.

[23] The Act expressly grants the independent counsels the power to decide on their own to what extent, if any, they will consult with DoJ on any matter. 28 U.S.C. §§ 594(a)(10); 594(d).

analogized to that of the President in this area than the Attorney General.[24] She must, therefore, be appointed as

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[24] Given the independent counsel's unlimited budget, her freedom from routine competition for limited resources, and the absence of any restraint on the length of her probe, any supposed temporal and jurisdictional limits are dubious at best. The fact that she may exercise her ultimate powers for a limited time cannot be determinative. Indeed, she already has served longer than senior DoJ officials: "Statistics show that since 1969, Attorneys General have averaged 23.3 months in office, Deputies 13.5 months, and Associates 18.6 months." GAO, *Justice Department: Improved Management Processes Would Enhance Justice's Operations* 20-21 (March 1986). In cases such as *United States v. Eaton*, 169 U.S. 331, 343 (1898), that address the short period during which an "inferior Officer" may exercise the power of a superior, the President at all times retains the power to remove that Officer and appoint a replacement. Here, the independent counsel completely displaces Executive authority.

The suggestion of *Amicus Curiae* Walsh (at page 13)—that the independent counsel's jurisdiction is "restricted" because it is defined "in reliance on the Attorney General's own application" and cannot be expanded "to include matters which the Attorney General has previously determined should not be pursued"—is entirely misleading. In Mr. Walsh's own investigation, the special court appointed the independent counsel and then defined his jurisdiction vastly beyond that sought by the Attorney General in his application. Whereas the Attorney General's application had focused only on alleged arms sales to Iran and an alleged diversion of profits therefrom, and had not even mentioned Nicaragua, the special court authorized a sweeping investigation into the "provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984." Order, *In re North et al.*, Div. No. 86-6 (D.C. Cir., Div. for the Purpose of Appointing Indep. Counsels, 1986). The court derived this jurisdictional grant verbatim from a letter sent by Democratic Congressmen directly to the court after the Attorney General *refused* to include their proposed jurisdiction in his Application. Copies of the Attorney General's request, the congressional request, and the court's order establishing jurisdiction, all of which appellant in this case filed with the special court in aid of her effort to expand her jurisdiction, are being lodged with the Court for its convenience.

Nothing appears to preclude further expansion of the scope of the investigation by the court, unless the Attorney General is asked and explicitly refuses to authorize the addition of new targets of

are these Officers. To hold otherwise would be to authorize Congress to divest the Attorney General, or indeed the Secretary of State, of all authority in a given area and, citing a perceived exigency, to vest in a court the power to appoint a parallel Attorney General, or Secretary of State, with those same powers. Such a result would "be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Nixon*, 418 U.S. at 704.

The vast discretion entrusted under the Act to the independent counsel is wholly different from that vested in officers previously held to be "inferior Officers." Unlike a postmaster first class, *see Myers*, *supra*, or a clerk of the district court, *see Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), both of whom are "inferior Officers," *see Buckley*, 424 U.S. at 126, *see also United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) (clerk in office of Assistant Treasurer of the United States), who exercise no ultimate authority, the independent counsels wield the most powerful weapon of the state—the power to investigate, indict, prosecute, and seek punishment of an individual. The effort of appellant and the several independent counsel *amici* to characterize themselves as "inferior" Officers is astonishing and deeply troubling. They make unreviewable judgments on a daily basis that strike at the core of the Executive function, and they exercise this great, unaccountable power over individual citizens free from all guidance and control by the Executive. At the same time, they are not removable at will by the Executive. No other Officer exercises core Executive powers but is not appointed by, answerable or accountable to, subject to review by, or removable by a more senior Executive Officer. Even with respect to regulatory agencies, whose Officers have been held not to

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the investigation. In this case, for example, while purporting to decline to permit an expansion, the special court advised the independent counsel to investigate a conspiracy that the Attorney General had said there was no basis for investigating.

exercise core Executive functions, the Officers are independent of the Executive "*except in* [*their*] *selection.*" *Buckley* v. *Valeo*, 424 U.S. at 136 (emphasis in original).

In sum, if there are any "superior" Officers whose appointment Congress cannot remove from the President, appellant must be in that category. The President is constitutionally entitled to appoint, with the consent of the Senate, department heads and "superior" Officers beneath them. In discrete areas, the independent counsels enjoy the full range of Executive responsibility entrusted to the Attorney General by the President, and their independence from the President, in fact, exceeds that of the Attorney General. To hold that these duties and responsibilities are those of mere "inferior Officers" would be to vest in Congress and the courts the means to usurp Executive control simply by creating a new office and transferring to it ultimate responsibility to exercise Executive power. The Constitution clearly forbids this.

B. An Inferior Officer with the Executive Power of the Independent Counsel May Not Be Appointed by a "Court of Law."

The court of appeals properly held that, even if the independent counsel were considered an "inferior Officer," Article II, § 2 does not authorize Congress to provide for her appointment and supervision by a court. This clause gives Congress authority to vest the appointment power over "inferior Officers" in the branch or department to which the Officer most appropriately belongs.[25] It cannot and does not authorize Congress to disregard basic separation of powers principles and instead vest the appointment power over core Executive Branch Officers in the Judicial Branch. Nor does it authorize any non-judicial activity by a court other than the proper exercise of any appointment power.

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[25] If the Officer does not most appropriately belong to one Branch, Congress may freely provide for his appointment from among those listed in the excepting clause of Art. 2, § 2, unless the result would be incongruous. *See* J.S. 37a-38a.

The basic purpose of the "excepting clause" is to allow the branches of government to appoint their own subordinate officials, to assure the compatibility of appointee, task and supervisor necessary to a functioning bureaucracy. For this reason, Congress may legitimately authorize the President to appoint any and all subordinate Executive Branch Officers, may vest in department heads the authority to appoint that department's subordinate Officers, and may grant federal judges the power to appoint Judicial Branch employees.[26]

It defies logic to read the provision more broadly, as suggested by appellant and *amici*, as allowing Congress to give the courts sole authority to appoint important, albeit "inferior," Officers of the Executive Branch.[27] To do so would give Congress the power to entangle the branches of government in stark violation of the carefully crafted separation of powers. It would, as the court of appeals observed, permit Congress to place in a court of its choice the power to appoint virtually all Officers of the Departments of Agriculture, State, or Defense, and thereby "prevent the President from exercising effective control over either the [Agriculture], State or Defense Department." J.S. 39a.

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[26] *See Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (judicial appointment of court commissioner); *United States* v. *Eaton*, 169 U.S. 331 (1898) (presidential appointment of vice-consuls); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) (Secretary of Treasury's appointment of clerks within his department); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (judicial appointment of court clerks); *Borak* v. *United States*, 78 F. Supp. 123 (Ct. Cl.), *cert. denied*, 335 U.S. 821 (1948) (Attorney General appointment of Immigration and Naturalization Service examiners).

[27] *See* Hearings on the Special Prosecutor Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 449, 452 (pt. 1) (1973) ("1973 Hearings") (statement of then-Acting Attorney General Bork) (power is one to "enhance convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the Executive to the Judiciary or, for the matter of that, transferring the powers of the Judiciary to the Executive").

The terrific chaos that would result from interbranch appointments led Judge J. Skelly Wright, dissenting in *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967) to reject, in the most persuasive and vigorous terms, the "plain meaning" construction of this clause offered by appellant and *amici*:

> [I]t is simply not true that Article II expresses any meaning quite so clear. Its language very naturally admits the common sense reading that courts of law and the other listed offices were meant to appoint only those officers "inferior" to them. . . . No one would dispute, for example, that Article II contemplates that Congress may permit a secretary to appoint only his own assistants, not the personnel of any of the other executive departments. And the narrower reading harmonizes with the most apparent purpose of Article II: to let Congress clothe secretaries and courts with the necessary authority for filling vacancies in their own staffs.

Id. at 921 (Wright, J., dissenting). *See also id.* at 920 (describing appellant's interpretation as "instinctively hostile to American constitutional tradition").

In its first look at the clause, this Court agreed that "the Constitution envisions rational and close relationships between the appointing branch and the nature of the function which the 'inferior officer' is to perform." Testimony of Roger Cramton, 1973 Hearings, at 350. In *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839) (emphasis added), the Court upheld the authority of a federal judge to appoint and remove court clerks, observing that "[t]he appointing power . . . was no doubt intended to be exercised *by the department of the government to which the officer to be appointed most appropriately belonged.* The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned."

Subsequently, in *Ex Parte Siebold*, 100 U.S. 371 (1880)—the case on which appellant and *amici* chiefly

rely to challenge the ruling below on this issue—this Court upheld a statute vesting in circuit courts the authority to appoint federal election supervisors. In the course of a lengthy opinion, involving a major confrontation between federal and state governments over control of congressional elections, this Court devoted just two pages to the argument that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." *Id.* at 397. The Court rejected this reading of Article II:

> [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and *in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.* It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. *Neither the President, nor any head of department, could have been equally competent to the task.*

Id. at 398 (emphasis supplied). The Court acknowledged, however, that the assignment to a court of adjudicatory or decisional responsibilities *other than mere appointment* would render judicial participation "incongruous."

Appellant's reliance on *Siebold* is unavailing. First, election supervisors are not the same as independent counsels; the latter exercise final and unreviewable law enforcement authority at the heart of the Executive function, while the election supervisors exercised a limited, essentially non-Executive function. The duty of the election supervisors was to inspect and scrutinize the registration and voting process in congressional elections. Voting Rights Act of 1870, as amended, 16 Stat. 433, 434-35 (1871). *See also* J.S. 36a-37a (discussing role of election supervisors). If they could not exercise their

duties, they were to report to the chief supervisor of the district, who was also a commissioner of the circuit court. 16 Stat. 435-37. The commissioner was directed to hold a hearing concerning the allegations and to make a report to Congress. *Id.* at 436. In effect, the election supervisors were agents of Congress for the purpose of determining whether to seat members. *See Siebold*, 100 U.S. at 382, 386, 389. To the extent election supervisors were to assist the marshals in preserving the peace or making arrests for offenses committed in their presence, 16 Stat. 436, they were no different than any other "bystanders or posse comitatus" who, by statute, could be summoned to aid the marshal in performance of his duties. *Id.* at 437.

Second, as the court of appeals observed, *Siebold* did not present, and this Court did not address, a "question of congressional encroachment on the President's power to execute the laws." J.A. 36a. Rather, "according to the Court, the issue was whether 'the Act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of elections.'" *Id.*

Siebold stands generally for the proposition that Congress may authorize the *appointment* of inferior Officers by a court only when (1) the appointment power could not have been assigned to either the President or a department head with "greater propriety," "convenience," or "competence" and (2) there is no "incongruity" in the court's role as both appointing power and judicial Officer. 100 U.S. at 398.[28] It provides no authority for judicial appointment of an Officer exercising purely Executive authority. And it provides no authority for judicial participation in anything other than the appointment process.

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[28] As the court of appeals ruled, at a minimum "it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch." J.S. 38a.

The Ethics Act fails the test of *Siebold* first, by authorizing a court to appoint an Officer such as appellant with final responsibility for certain core Executive decisions, and second, by failing even to limit the duties of the court under the Act to that one function. Instead, the court also defines her jurisdiction, retains supervisory power over her, and, despite its conflict of interest, the court may review and overrule any Executive effort to remove her from office. In selecting the person who is to serve as independent counsel, and in defining her jurisdiction, the court is forced into the midst of political battles, when it plays a decisive role in the exercise of the Executive powers of investigation and prosecution without the benefit of judicial precedent or other decisionmaking criteria. This assignment places federal judges in a decidedly awkward and incongruous position. The perception of judicial fairness and neutrality that renders judges an acceptable choice for this role is itself threatened by a court's assumption of such a politically charged, non-judicial duty. As Judge Wisdom said in *United States* v. *Cox*, 342 F.2d at 192 (concurring opinion), "[t]he functions of prosecutor and judge are incompatible." Whatever the outer limits of the term "incongruous," this role falls squarely within it.[29] *See also Hobson* v. *Hansen*, *supra*, 265 F. Supp. at 922-24 (Wright, J., dissenting) (describing problems that arise from judicial involvement in highly-charged non-judicial activity).

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[29] *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) does not hold that Congress may vest in courts the power to appoint inferior Officers (in that case, Commissioners) who exercise prosecutorial powers, as *Amicus Curiae* Walsh repeatedly asserts (at pages 16, 17 and 25). The Commissioners' exercise of prosecutorial power was not before the Court in *Go-Bart*. To the contrary, the Court expressly considered an exercise of power where the Commissioner "acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time." 282 U.S. at 354. The passage quoted by Mr. Walsh enumerates the powers of the Commissioners generally, not the power presented to, and sustained by, this Court in that case.

Read together, this Court's decisions in *Siebold* and *Hennen* preclude reliance on Article II to approve judicial appointment of an Officer exercising duties that lie at the heart of the Executive's power to enforce the law. They further preclude reliance on Article II to approve non-judicial conduct undertaken by courts in connection with their appointment function. *See* Part V, *infra*. The special court's appointment, supervision, and removal authority under the Act fails on both counts and is therefore unconstitutional.

The appointment of appellant by the special "court" is unconstitutional for an additional reason. Although the appointment was made by a purported "division" of the court of appeals, that "division" has no operational or functional relationship to the court of appeals.[30] The division is in reality a collection of three judges whose sole function is to appoint and supervise independent counsel. Because that function is an Executive rather than a Judicial function, and because the Judges perform none of the functions characteristic of a court of law, the division does not constitute a "court of law" within the meaning of the "excepting clause." Congress has not entrusted the power to appoint independent counsel to a properly constituted court that ordinarily decides cases and controversies, as the "excepting clause" permits in certain circumstances. Simply denominating the panel of three judges as a division of a functioning

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[30] Other than appoint, define the jurisdiction of, and supervise independent counsels, the "court" performs only two functions: it has discretion to review applications for, and to award, attorneys' fees only where no case or controversy has arisen (that is, where no indictment is brought), and it has had jurisdiction over a civil action brought by an independent counsel whom the Attorney General has sought to remove. As noted *infra* in text, this latter role now has been removed from the special court, in part because of the inherent conflict in its reviewing the removal of an independent counsel it has appointed. *See* Brief of United States Senate as *Amicus Curiae* at 12 (quoting H.R. Rep. No. 316, 100th Cong., 1st Sess. 34 (1987)); J.S. 54a.

court should not render it a "court of law" when it otherwise does not act as one.

The recent amendments to the independent counsel provisions remove any argument that the special court is a "court of law" within the meaning of Article II. Under the pre-amendment act, the division *at least* adjudicated disputes about the removal of an independent counsel. *See* 28 U.S.C. § 596(a)(3). The amendments have removed that function from the division.[31] The "court" now has no judicial function whatsoever. It is merely a collection of three judges executing the law. While it might be argued that the allocation of an Executive function to judges acting in their capacity as individuals, not judges, would not violate the separation of powers, *see In the Matter of President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370 (3rd Cir. 1986), it is beyond dispute that judges acting in their individual capacity, and not as members of a court, are not a "court of law" as described in Article II. Because they are not a court of law, they cannot exercise the appointment power in Article II. Congress's delegation of the appointment power to that entity exceeds the limits of its power under Article II, just as its delegation of the appointment power to itself was held to violate Article II in *Buckley* v. *Valeo*.

C. The Necessary and Proper Clause Does Not Allow Congress to Circumvent Article II.

As a ground for reversal of the court of appeals, *Amici Curiae* Lawrence E. Walsh and Burton D. Linne maintain that the Necessary and Proper Clause of the Constitution "provides explicit textual authority for Congress to enact an independent counsel statute that it rationally deems necessary . . ." (Walsh Brief at 2), and that the Act is therefore constitutional. This argument squarely conflicts with the basic principle, articu-

[31] Under the amendments, review may be had in the district court, not the special court. *See* Pub. L. No. 100-101, § 2, 101 Stat. 1293, 1305 (1987).

lated by this Court in *Buckley* v. *Valeo*, 424 U.S. at 134-36, that the Necessary and Proper Clause does not authorize Congress to do what the Constitution otherwise precludes it from doing, whatever the policy reasons for Congress's actions. In *Buckley* v. *Valeo*, this Court rejected this very argument, bluntly ruling:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Id. at 135. Congress has no power to enact a statutory mechanism that violates the separation of powers or any other constitutional principle. Since *Buckley*, this Court has repeatedly denied Congress's authority to pass legislation in violation of the separation of powers, even in aid of Congress's own enumerated powers. *See, e.g., INS* v. *Chadha*, 462 U.S. at 940-41 (Congress's power over naturalization). There is no warrant for its doing so in aid of power vested in *another* branch of government.[32]

III. THE APPOINTMENT OF ASSOCIATE COUNSEL IS UNCONSTITUTIONAL.

In *Buckley* v. *Valeo*, *supra*, this Court held that Officers of the United States must be appointed in the manner prescribed in Art. II, § 2. The associate counsel appointed by the independent counsel are exercising the

[32] As a logical extension of the argument advanced by *amici*, Congress could freely limit the President's pardon power with respect to members of the Cabinet, or limit the President's power to enter into certain kinds of treaties, if Congress merely *rationally* perceived those limits to be an aid to the Executive's faithful execution of the laws. Precedents in this Court squarely refute Congress's authority to carve up the Executive function whenever it can articulate a rational basis—or any basis—for doing so. *See, e.g., Ex Parte Garland*, 4 Wall. 333 (1867).

powers of Officers of the United States, but they were appointed by the independent counsel, not in the manner prescribed by Article II. This case is on all fours with *Buckley* v. *Valeo*, and the same result must follow: the associate counsel may not exercise the powers unconstitutionally assigned to them. The staff attorneys are for all intents and purposes Assistant U.S. Attorneys or their superiors. They may appear before the grand jury, sign subpoenas, sign pleadings, and argue in court. As the equivalent of Assistant U.S. Attorneys, they exercise *at least* the degree of discretion and authority, in determining whom and what to subpoena, and in conducting grand jury and court proceedings, as the judicial clerks and third-class postmasters held to be inferior Officers in *Buckley* v. *Valeo*.

Under Article II, these Officers must be appointed by the President with the advice and consent of the Senate or, if Congress has so provided, by the President, a court of law (subject to the constraints outlined in Part II.B, *supra*), or a department head. Appellant is neither a President, a court of law, nor a department head.[33] The parallel to *Buckley* v. *Valeo* is straightforward.[34] Congress cannot empower a private individual—or even an inferior Executive Officer—to exercise the appointment power under the excepting clause of Article II any more than Congress itself can exercise such power. In *Buckley*, the improperly authorized exercise of power by the appointees had to cease. So must it here.

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[33] Independent counsel exercises *at least* the authority of a department head but is not a department head for constitutional purposes because she was not appointed as one must be—by the President with the consent of the Senate.

[34] It is notable that the Act nowhere provides for the removal of members of the independent counsel's staff. Presumably, appellant is empowered to remove them at will; it is far from certain whether the Attorney General may do so at all, or if so, under what circumstances.

IV. THE REMOVAL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE UNCONSTITUTIONAL.

The President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity . . . includ[ing] the enforcement of federal law . . . and management of the Executive Branch—a task for which 'imperative reasons requir[e] an *unrestricted power [in the President] to remove* the most important of his subordinates in their most important duties.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982) (quoting *Myers* v. *United States*, 272 U.S. 52, 134-35 (1926)) (emphasis supplied). The Ethics Act severely restricts the Executive's authority to remove the independent counsel and subjects any attempted removal to *de novo* judicial review. *See* 28 U.S.C. § 596(a)(1). The Act requires that any attempted removal be accompanied by a written explanation to the special court and to Congress, and it gives the court jurisdiction to review the removal for any error of fact or law and to rescind it. These statutory provisions collide directly with basic separation-of-powers principles and are unconstitutional.

As this Court recounted in *Bowsher* v. *Synar*, 106 S. Ct. at 3187,[35] the First Congress considered the President's removal authority during debate on bills establishing the Executive Branch departments. The issue was whether the President should have absolute authority to remove Department Heads, without the advice and consent of the Senate. In the "Decision of 1789," Congress determined that under the Constitution the removal authority belongs to the President alone. Because

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[35] As *Bowsher* made clear, it is appropriate to review a removal provision that creates "here-and-now" subservience to another branch and thereby raises separation-of-powers problems. 106 S. Ct. at 3189 n.5. Given the relationship of the independent counsel to the special court and that court's ability to overrule the Attorney General and reinstate the independent counsel, those concerns are present here as well. *See also* J.S. 43a n.36 (discussing additional problem of "here-and-now" freedom from Executive control created by removal restrictions).

this decision represents a nearly contemporaneous construction of the Constitution by a Congress composed of many members of the Constitutional Convention, it is entitled to great weight. *See id.*; *Parsons* v. *United States*, 167 U.S. 324, 328-30 (1897). This Court has described the Decision of 1789 as "the settled and well-understood construction of the constitution," *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

In *Myers* v. *United States*, 272 U.S. 52 (1926), this Court first confronted the issue of the President's power to remove top Executive officials when it was asked to rule on a statute providing for the discharge of postmasters by the President with the advice and consent of the Senate. In a comprehensive opinion holding the statute unconstitutional, the Court ruled that Congress cannot interfere with the President's performance of his duty to execute the laws by limiting his control over his subordinates. For Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.* at 161. Chief Justice Taft explained:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.
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> Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . .

Id. at 117, 163-64.

A decade later, in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), this Court considered the authority of Congress to limit the President's power to remove a Federal Trade Commissioner. The relevant statute provided for removal by the President but only for "inefficiency, neglect of duty, or malfeasance in office." The President, however, had sought to remove the commissioner because of policy differences between them. This Court upheld the statute's restriction on the President's removal authority, ruling that an "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.* at 629 (quoted in *Bowsher*, 106 S. Ct. at 3188). The Court reasoned that, unlike a postmaster who is "an executive officer restricted to the performance of executive functions," the FTC commissioner exercises "quasi-judicial" and "quasi-legislative" powers, 295 U.S. at 624, and is "wholly disconnected from the executive department." *Id.* at 630.[36] Although it carved out an exception for Officers who exercise "no part of the executive power vested by the Constitution in the President," *id.* at 628, and over whom the President might therefore have less than full control, the Court reaffirmed the holding in *Myers* that congressional participation in the removal of

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[36] Thereafter, in *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court concluded that under *Humphrey's Executor*, the President did not have unrestrained removal authority over a member of the War Crimes Commission, in light of the "intrinsic judicial character of the task with which the commission was charged." *Id.* at 355. *Wiener* reaffirmed the President's illimitable power of removal of "purely executive officers." *Id.* at 352.

"purely executive officers" is unconstitutional. *Id.* at 627-28.[37]

Most recently in *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), this Court held that the Comptroller General's exercise of Executive functions under the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the "Gramm-Rudman-Hollings Act") violated separation-of-powers principles because the Comptroller General is not removable by the Executive but only by a Congressional Joint Resolution or by impreachment. Congress, the Court held, may not retain the power of removal over an Officer executing the law, such as the Comptroller General, other than by impeachment.

The Ethics Act violates these principles. First, it limits the grounds on which the independent counsel may be removed by the Attorney General. Since the independent counsel exercises core Executive functions, and no "quasi-judicial" or "-legislative" functions, under *Myers* she must be removable at will by the Executive. The independent counsel, after all, does not merely execute the Ethics in Government Act, *compare Bowsher*, *supra*; *see* J.S. 50a (functions of independent counsel carry "more—much more—Executive discretion than the specific duties" at issue in *Bowsher*). She has the power to investigate violations of, and bring prosecutions under

[37] This principle precludes not only direct congressional involvement in removal of core Executive Officers, but also congressional limits on Executive discretion to remove those Officers. In *Morgan* v. *Tennessee Valley Authority*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941), the Sixth Circuit upheld the President's authority to remove at will the Chairman of the TVA's Board of Directors, overruling a congressional effort to impose limits on the President's discretion. Congress had sought to reserve to itself exclusive discretionary power to remove a director and had imposed on the President a mandatory duty to remove for stated causes, and for those causes only. *Id.* at 991. Because administration of the TVA was an Executive function and the chairman's powers were not adjudicative, the court held that the President was constitutionally empowered to remove the chairman at will.

all the criminal laws of the United States and to do so without any guidance from the Executive Branch. Such an Officer must be removable at will by the President.

Second, the Act intrudes the court and Congress into the removal process in clear contravention of *Bowsher's* admonition against the direct involvement of the other branches in the removal of Executive Officers. The Attorney General must submit a report to Congress and the special court detailing the facts found and ultimate grounds for removal. 28 U.S.C. § 596 (b). The special court may then review the removal *de novo* and reinstate the independent counsel. *Id.* § 596(c). The result is to permit a judicial veto of the removal decision; the court could simply reinstate an Officer found by the Executive to be unsatisfactory for any number of policy reasons. Under the Constitution, however, neither the court nor Congress may properly become so entangled in the execution of the laws.

The court's power to review and reject the Attorney General's removal decision is on all fours with a *congressional* power to advise and consent to an independent counsel's removal—a right the First Congress rejected as unconstitutional. That Congress recognized that a requirement of Senate concurrence might clash with the Executive's constitutional duty and therefore could not be countenanced. As Rep. Boudinot stated:

> If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly they will inquire if the complaint is well founded. To do this, they must call the officer before them to answer. Who, then, are the parties? The supreme Executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he

> is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the constitution, to prevent his having officers imposed upon him who do not meet his approbation?

1 *Annals of Congress* 487 (June 16, 1789). The flaw is the same here: removal from the Executive of the tools to perform his constitutional duty, with the consequent diminution in his power and expansion of that of other branches. The law never has been, and logically ought never to be, that Congress may freely remove from one branch the power constitutionally entrusted to it, and relocate it, as long as the result is not a direct, but only a comparative, increase in congressional power.[38]

This Court's precedents establish that the Executive must have the authority to remove at will Officers exclu-

[38] The change in the provisions for judicial review of removal decisions to which appellant and *amici* refer—placing jurisdiction over the civil action for reinstatement in the District Court for the District of Columbia rather than the special court, and narrowing the standard of review—do not affect the constitutional analysis, and in fact create rather than eliminate constitutional infirmities. Appellant and amici overstate the effect of the recent amendments to these provisions on the Act's unconstitutionality. The Act would still prohibit removals at will. A court (albeit not the "special court") still may review a removal decision and may reinstate the official if the removal is deemed improper. The Conference Report on the amendments reaffirms that the "good cause" limitation is meant to "protect[] the independent counsel's ability to act independently of the President's direct control" and that removals are only permitted "for misconduct." *Independent Counsel Reauthorization Act of 1987*, H.R. Conf. Rep. 452, 100th Cong., 1st Sess. 37 (1987). The Report also indicates that an independent counsel may disobey any presidential order that interferes with the integrity of the proceedings. *Id.* Thus, if the President determines that national security or foreign policy concerns outweigh the need for a criminal prosecution, the independent counsel presumably is free to disagree. At least one independent counsel already has adopted this interpretation. *See* J.S. 57a-58a. *See also* Seymour Brief at 10 (describing "[a]rms-length negotiations" held with executive agencies regarding declassification).

Moreover, as noted at Part II.B, *supra*, removal of the special court's jurisdiction creates additional constitutional problems.

sively exercising core Executive functions, and that no branch of government may aggrandize itself by limiting that removal authority or otherwise intruding into the process. As the court of appeals held, the Ethics Act violates these principles and cannot stand.

V. THE SPECIAL COURT'S EXERCISE OF THE POWER TO APPOINT, DEFINE JURISDICTION, AND SUPERVISE VIOLATES ARTICLE III.

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat* v. *United States*, 219 U.S. 346, 355 (1911) (citation omitted). Nothing in the Constitution authorizes courts to appoint a prosecutor, define the scope of a criminal investigation, or supervise a criminal investigation. The special court nonetheless performs these non-judicial duties under the Act. Because Congress may not constitutionally vest in Article III courts powers beyond those "clearly confided" to them by the Constitution, the court of appeals correctly ruled that the special court's acts are unconstitutional.

In response, appellant and those few *amici* who address this basis for the ruling below maintain that Congress may expand the authority of courts beyond that provided in Article III, even to encroach on the Executive's Article II powers, when Congress deems that expansion to be a "necessary" incident of the court's Article II appointment power. *See, e.g.*, Brief for Appellant at 43-45; Brief for *Amicus Curiae* Public Citizen at 9. This analysis, which relies on a grossly understated vision of the role of the special court, is entirely unsupported. Not a single case, commentary, or other authority is cited to suggest that Congress may willy-nilly expand the limited appointment power given to courts under Article II and thereby violate the limits of Article III or any other constitutional provision. In fact, the law is directly to the contrary. *See* Part II.C, *supra*.

It is well established that Congress may not assign to judges holding office under Article III executive or ad-

ministrative duties of a non-judicial nature, and that the courts may not exercise such power if granted. *See Buckley* v. *Valeo*, 424 U.S. at 123; *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Ex Parte Siebold*, 100 U.S. at 398; *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).[39] The judicial power of the courts is limited to cases and controversies. *Muskrat*, 219 U.S. at 356. "Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." *Id.* It also is "elemental that there must be parties before there is a case or controversy." *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975). *See also Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U.S. 716, 724 (1929).

A principal purpose of the "case or controversy" limit on judicial power is " 'to assure that the federal courts will not intrude into areas committed to the other branches of government.' " *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)). The Ethics Act thrusts a panel of judges directly into areas committed to the Executive and delegates to them duties that bear none of the indicia of cases or controversies.

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[39] *Hayburn's Case* concerned a statute vesting in the courts of appeals the power to settle pension claims of widows, orphans and invalids, subject to review and revision by the Secretary of War and Congress. A change in the law rendered the case moot, but this Court's reporter published opinions of three circuit judges, including Justices Iredell and Jay, who had protested the act or refused to act under it. The opinions concluded that the statute violated the separation of powers to the extent it required judicial Officers, acting in that capacity, to perform tasks that formed no part of Article III powers and subjected their decision to review by the Executive. *See United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-51 (1852) (discussing *Hayburn's Case*).

This Court later decided that since the power delegated by statute was not judicial power within the meaning of the Constitution, but nonetheless was intended by Congress to be executed as a judicial function, the statute was unconstitutional. *See United States* v. *Yale Todd*, 54 U.S. (13 How.) 52 (1794) (note following *Ferreira*).

The package of non-judicial powers entrusted to the special court is substantial. On its own, the court compiles a list of possible candidates for the job of independent counsel. It delegates to a private attorney the extraordinary assignment of acting as the Attorney General of the United States with respect to a certain group of activities—an individual who, unlike the real Attorney General, need not heed the direction of the President with respect to law enforcement or other policy issues. The special court then defines this attorney's investigative and prosecutorial jurisdiction, thereby stripping the Attorney General of his power and placing it instead in an office of its own creation. In performing this task, the special court is not bound by the request of the Attorney General. Contrary to appellant's assertion (at 44), the court freely second-guesses the Attorney General and expands the jurisdiction beyond that requested by the Attorney General in his application to encompass any matter the court believes appropriate.[40] In doing so, the court abandons

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[40] For example, in this matter the Attorney General requested that the court appoint an independent counsel to look into a narrow issue—whether Mr. Olson violated any federal criminal law when he made two unsworn statements to Congress. Attorney General Report at 2-3. The special court ordered a considerably broader investigation, however. The special court additionally authorized investigation into, and the prosecution of, any other violation of any federal law by Mr. Olson—whether or not related to or arising out of the events leading to the initial referral. The court later also "clarified" its original order to allow appellant to investigate an alleged conspiracy not included in the Attorney General's application. The lower courts have held that a court may not review or overrule the Attorney General's decision not to refer a case to an independent counsel. *See Nathan* v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984). Yet the special court has done exactly that by initiating an investigation of matters other than those specifically referred to it by the Attorney General.

In at least two other independent counsel investigations, the special court also expanded the jurisdiction of the independent counsel beyond that requested by the Attorney General: in the investigation of Michael K. Deaver, and in the investigation of Oliver L. North. As noted at note 24, *supra*, in the latter of these, the expansion followed, essentially verbatim, a request from Democratic

its Article III role as an impartial adjudicator to fulfill its assignment as Executive decision-maker. In abandoning a court's traditional role, the special court jeopardizes both the appearance and reality of judicial impartiality, which is a "central, constitutionally ordained, requirement[] of the federal judicial office." *In re Application of President's Commission on Organized Crime (Subpoena of Scaduto)*, 763 F.2d 1191, 1197 (11th Cir. 1985).

After defining the scope of the criminal investigation and empowering the independent counsel to proceed, the special court retains supervisory power over the independent counsel. In this capacity the special court already has exceeded the bounds of Article III by issuing advisory opinions on its own constitutionality, *see In re Olson*, 818 F.2d 34 (D.C. Cir. Div. for Purpose of Appointing Independent Counsels, 1987), and by issuing advisory orders that independent counsels and their staffs are employees of a "separate special agency" who need not adhere to DoJ conflict of interest rules. These rulings are not an exercise of Article III judicial power.

Before terminating her office, the independent counsel must submit to the court a full and complete description of her work, "including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." 28 U.S.C. § 595 (b)(2). Until the independent counsel is in "full compliance" with this section, her office cannot terminate, *see* § 596(b)(1). The court must therefore review the stated reasons not to prosecute to assure that the independent counsel is in "full compliance" with the statutory mandate. This judicial role is in obvious conflict with

members of Congress for a broader investigation than that requested by the Attorney General. In the Deaver matter, the independent counsel received a request directly from Congress to investigate certain matters and then retroactively obtained the permission of the court to include those matters within its jurisdiction. *See* Motion of *Amicus Curiae* Michael K. Deaver for Leave to Participate in Oral Argument, No. 87-1279, at 4-5 (March 30, 1988).

the many cases holding that the Executive alone makes the decision not to prosecute, and that courts shall not review any such decision.[41]

In the event of removal of the independent counsel by the Attorney General, the Attorney General must file with the court "a report specifying the facts found and the ultimate grounds for such removal," § 596(a)(2), which the court may make public in whole or in part, again at its own discretion and for its own reasons. Under the pre-amendment Act, the independent counsel may obtain *de novo* review of the removal before this same court that appointed her, and may obtain reinstatement if the removal "was based on error of law or fact." In other words, the Act requires the Executive to justify the decision to remove a top Officer, and it authorizes the special court to review the removal decision *de novo*, to substitute its own understanding of good cause for that of the Attorney General, and to reverse the Executive's decision as to Executive personnel. "Such a decision would likely turn on issues of public policy, for example, the appropriate limitations to be placed on a prosecutor's zeal, that are beyond traditional judicial competence," J.S. 54a. In short, "the word 'review' is a misnomer; the Special Court is basically a 'superior and revising agency' with a veto over the Attorney General's decision." J.S. 55a-56a.

Given the non-judicial character of the special court's work, it is hardly surprising that the court does not function like a court. Courts sit to decide cases or controversies, but the special court rarely has held an ad-

[41] Moreover, the special court decides whether to release to Congress and the public the independent counsel's final report—in other words, it determines the extent to which the independent counsel it has appointed shall be accountable to the public and its representatives, and the extent to which the public shall remain uninformed. *See* § 595(b)(3). The Act provides no criteria on which to base this decision on disclosure, and the special court is required to establish none; and unlike any other lower federal court, the decision of the court apparently is unreviewable.

versarial proceeding. Courts traditionally are open to the public, but the special court has never convened in public. It is not known to what extent there are hearings, motions, or rules of court because proceedings routinely are conducted in secret. The court does not even maintain a public docket. And unlike other courts, the special court's discretionary decisions are completely unreviewable.[42]

Equally disturbing is the political role into which the Act inevitably thrusts members of that court. The matters that give rise to calls for independent counsels invariably are highly charged and intensely political. The Act forces judges to take sides on these issues when they decide whom to appoint and what jurisdiction to authorize but, although acting as a court, they have no judicial precedent to use as guidance. Personal opinions and politics necessarily come into play as the criteria of decisionmaking. For example, assuming the court is unable to locate an independent counsel who is politically neutral, the court by its selection creates the very same conflict feared by the appellant and *amici*: an independent counsel who either bends over in favor of or against the current Administration. The same is true when it overrules the Attorney General's proposed jurisdiction at the behest of Congress. And, precisely because their role is a public one, judges of that court have granted interviews on matters pending before the court and have testi-

[42] The role of the special court may not be reconciled with Article III by reference to the participation of individual judges on panels such as the Sentencing Commission. *See* Brief of *Amicus Curiae* Public Citizen at 10. Lower courts have rejected separation of powers attacks on such panels by holding that judges sit on them in their private capacities. *See In the Matter of President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370 (3rd Cir. 1986). Whether or not that very different activity is constitutional is irrelevant to the present question, which necessarily centers on the constitutionality of a *court's* exercise of executive powers. Only a "court of law," and not a group of judges acting in their non-judicial capacities, can constitutionally exercise the appointment power under Article II's excepting clause.

fied before Congress to make known their views on matters pertaining to the court. These activities only highlight the manner in which the Act's realignment of constitutional powers draws the courts into the political fray.

The special court's many and varied activities constitute no less than the exercise of Executive and Legislative power by a court and bear no relationship to the neutral resolution of adversarial proceedings contemplated by Article III. They are, quite plainly, not "judicial" within the constitutional meaning of the term and are therefore null and void. *See also Ex Parte Siebold*, 100 U.S. at 398 (certain decisional roles imposed on courts are not judicial and are therefore void).

VI. THE STATUTORY SCHEME AS A WHOLE VIOLATES THE SEPARATION OF POWERS.

The constitutional infirmity of the independent counsel provisions is particularly apparent when they are considered as a whole. Under the Ethics Act, the independent counsel performs functions that constitute "execution of the law in constitutional terms," *Bowsher* v. *Synar*, 106 S. Ct. at 3192, but she is not a member of the Executive Branch by any plausible criteria. Instead, under the Act, she is accountable to, and under the direction of, the legislature, the courts, and herself. Through creation of a web of judicial and congressional supervision and direction, the Act divests the President of control over an Officer exercising the core executive function of interpreting, in the name of the United States, all the laws of the United States and of prosecuting, also in the name of the United States, offenses against the United States.

The Ethics Act establishes a "statutorily required relationship [between the independent counsel and] the Legislative [and Judicial] Branch[es]," *Bowsher* v. *Synar*, 106 S. Ct. at 3196 (Stevens, J., concurring), and it thereby intrudes the Judicial and Legislative Branches into the function of executing the laws. With respect to the Legislative Branch, for example, the Act contains detailed

reporting and other obligations that render the independent counsel directly accountable to it, and, at the same time, circumvent Executive claims of Executive privilege that might be interposed. Thus, the Act requires that the independent counsel "*shall* send to the Congress" (28 U.S.C. § 595(a) (emphasis supplied)) periodic statements or reports on her activities, which need not be made public, thereby assuring day-to-day oversight of the execution of the laws. In the same vein, the Act provides that appropriate congressional committees "*shall* have oversight jurisdiction with respect to the official conduct of any independent counsel" (§ 595(d) (emphasis supplied)), and that the independent counsel "*shall* have the duty to cooperate with the exercise of such oversight jurisdiction." *Id.* (emphasis supplied). In a provision that renders the independent counsel an agent of the House, the Act further requires that the independent counsel "*shall* advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment." § 595(c) (emphasis supplied). Moreover, certain members of Congress may request the appointment of an independent counsel and, if they do, the Attorney General is *required* to respond to their request and, if an independent counsel is not sought, he *must* explain why the application was not made. § 595(e). And, if the Attorney General removes an independent counsel, he must "promptly" submit to congressional committees "a report specifying the facts found and the ultimate grounds for removal." § 596(a)(2). These provisions create an unprecedented legislative entanglement in the execution of the criminal laws and demand from an independent counsel allegiance and accountability to Congress far in excess of that owed to the Executive.

The role of the special court is even more intrusive. The Executive's authority to define the scope of a criminal investigation is subject to expansion by the special court, which is statutorily entrusted with defining an independent counsel's jurisdiction. § 593(b). The Attorney General's statutorily constrained ability to remove the independent counsel is subject to judicial review with apparently no deference, and to reversal. § 596(a). As the court of appeals stated, it is as if the Attorney General must apply to the special court before he may remove the independent counsel (J.S. 56a), and the special court may issue an unexplained, unreviewable, refusal. And before terminating her inquiry, the independent counsel *must* submit to the court a detailed report describing the work of the independent counsel, "including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." § 595(b)(2).

To approve this Legislative and Judicial intrusion into the Executive arena would be to overlook 200 years of development of separation of powers principles, culminating in this Court's recent decisions containing the powers of the respective branches. This is not a case in which appointment but not removal, or removal but not appointment, of an Executive Officer is located outside the Executive Branch of government, thereby merely diminishing the ability of the Executive to control the execution of the laws.[43] On the contrary, this is a case in which the President and Attorney General are to an unprecedented degree divested by Congress of virtually all appointment, supervisory, and removal authority in an area of government that is constitutionally entrusted to them, with a resulting, serious imbalance of authority among the branches. "If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power

[43] The Court need not consider whether the head of an agency may be removed only "for good cause"—an issue on which many *amici* focus—unless it disagrees with the court of appeals' other rulings on Article II, and Article III, and the infirmities in the statute as a whole.

and it all belongs to the Executive." *Nathan* v. *Smith*, 737 F.2d at 1079 (Bork, J., concurring). In attempting to carve up the Executive's law enforcement power and purporting to hand a healthy slice to independent counsels, Congress ignored this basic constitutional principle.

It is no answer to assert that this scheme is acceptable because Congress has not aggrandized Executive power *to itself*. This argument assumes that the separation of powers may be violated only where Congress itself usurps a function entrusted to another branch. In fact, the separation of powers may be violated in other ways: "One branch may interfere impermissibly with the other's performance of its constitutionally assigned function," or "one branch [may] assume[] a function that more properly is entrusted to another." *INS* v. *Chadha*, 462 U.S. at 963 (Powell, J., concurring). Both of these are violated here. First, as is described *supra*, in numerous ways Congress affirmatively has sought to assume for itself, and more blatantly for the special court, both direct and indirect control over the independent counsel's execution of the law. Second, by divesting the Executive of its authority and shifting that authority to a "fourth branch" variously accountable to the court and Congress (but not to the people), Congress *necessarily* diminishes the power of the Executive and thereby "interfere[s] impermissibly with the [Executive's] performance of its constitutionally assigned function." *INS* v. *Chadha*, 462 U.S. at 963 (Powell, J., concurring). One can easily imagine the other Executive activities Congress might transfer to such an "independent" counsel, such as the judicial appointment power, or control of Central American affairs, under the guise of non-aggrandizement.

Nor does a perceived political exigency justify Congress's alteration of the balance of power among the branches.[44] *INS* v. *Chadha*, 462 U.S. at 944; *Bowsher* v.

[44] The need for legislation cannot save legislation that violates the separation of powers, and *Nixon* v. *General Services Administration*, 433 U.S. 425 (1977), which is cited in briefs in support of

Synar, 106 S. Ct. at 3193-94; *Buckley* v. *Valeo*, 424 U.S. at 134. The Framers were well aware that a high Executive Officer might commit an offense against the state, and that that possibility might create special problems for the Executive.[45] They accordingly provided means by which Congress might hold the Chief Executive and his agents accountable to the people for any failure to prosecute wrongdoers without divesting the Executive of its duty to execute the law. Congress's power to investigate and censure, power of the purse, power to withhold consent to nominations, and power of impeachment, give it more than ample means to prevent, ferret out and remedy abuses of power. The impeachment power, in fact, was meant to address the very concerns raised:

> The power of impeachment will generally be applied to persons holding high offices under the government; and *it is of great consequence, that the president should not have the power of preventing a thorough investigation of their conduct, or of securing them against the disgrace of a public conviction by impeachment, if they should deserve it. The constitution has, therefore, wisely interposed this*

the Act, is not to the contrary. That case rejected a separation-of-powers challenge to a law giving to the General Services Administrator, *an Executive Officer*, control over certain presidential documents. The statute did not divest the Executive of any authority; by statute the Administrator remained subject to the direction and control of the President. *See* 40 U.S.C. § 751(a); 433 U.S. at 444. The statute at issue merely assigned certain Executive duties to the Administrator's office. This Court established a balancing test to review legislation affecting the *organization* of the Executive Branch. *Nixon* did not involve alleged violations of the Executive's Article II appointment or removal powers or of Article III, and the *Nixon* analysis is not applicable. *Bowsher*, *Chadha*, and *Buckley* are the analogous cases, and in none did this Court consider the need for the legislation, or perform a balance, after identifying a violation of Article II or the separation of powers.

[45] Indeed, the fact that the perceived conflict of interest is "inherent" in our constitutional scheme is a basis for rejecting Congress's effort to remove the conflict, not for upholding it. *See* J.S. 64a-65a.

> *check upon his power, so that he cannot, by any corrupt coalition with favorites, or dependents in high offices, screen them from punishment.*

2 J. Story, *Commentaries on the Constitution of the United States* § 1501, at 368 (1858) (emphasis supplied). In other words, the Constitution provides Congress with the weapon of impeachment to use first as a threat, to assure compliance by the Executive with the laws, and thereafter, if necessary, either to investigate and punish offenses by persons akin to those covered by the Ethics Act, or to punish the Chief Executive for his failure to prosecute such offenses himself. There is no authority for Congress's bald decision to assume, *before the fact*, that the Executive will be unable to act properly and, on that basis, to remove from the Executive responsibility for the execution of the laws. The Constitution's mechanism for dealing with an Executive failure to act properly is the ballot box or, if need be, impeachment, not an independent counsel statute premised on hypothetical failures.

This Court recognized early on that the problem of executing the laws with respect to senior administration officials is one that is constitutionally entrusted to the President to solve. If the President fails in this regard, he is accountable "only to his country in his political character and to his own conscience." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). *See also* 1 Annals of Congress 480 (June 16, 1789) (Rep. Madison) (if the President abuses his power to execute the laws, his pardon power, or any other authority, "he is impeachable for any crime or misdemeanor before the Senate, at all times; and . . . he is impeachable before the community at large every four years, and liable to be displaced if his conduct shall have given umbrage during the time he has been in office."). These constitutional checks and balances have worked for two centuries and provide Congress and the people ample means to assure that corrupt government officials are investigated and prosecuted. Even if "necessity" could, as a constitutional matter, justify a violation of separation of powers, there is no "necessity" here.[46]

There also is no reason to assume that the Department of Justice has an irremediable conflict of interest that demands congressional and court intervention when an investigation involves senior Executive Officers. *People* in the Department, but not the Department itself, may well have conflicts of interest. If they do, it is their legal and ethical duty to recuse themselves. This does not mean that every member of the Department—such as United States Attorneys or the attorneys in the Office of Professional Responsibility, whose charter is to conduct sensitive investigations—has a conflict of interest. The willingness with which two court-appointed independent counsels have embraced and relied upon "parallel" appointments from the Department of Justice, while claiming to retain independence equal to that enjoyed under the Act, belies any argument to the contrary. The Act reflects not an existing exigency, but Congress's distrust of the Executive to abide by applicable conflict of interest rules and to develop solutions where routine prosecutions might be suspect. Only by endorsing this congressional expectation of an Executive failure to adhere to the oath of office could this Court even think that a need for this Act actually exists.

The Constitution entrusted the execution of the laws to the President, and with him it must lie. The Ethics Act's rearrangement of the powers of government is unconstitutional, and the actions of the independent counsel thereunder are consequently void.

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[46] There is, moreover, no basis for believing that extant processes are unworkable. First, the history recounted at length by *amici* demonstrates that the Executive is capable of solving the problem by establishing an "independent" entity to investigate Officers. Second, the congressional investigation into the sale of weapons to Iran and the alleged diversion of proceeds to Nicaraguan insurgents, and the four-volume House Majority report that led to appellant independent counsel's investigation, confirm the ability of Congress to investigate Executive Branch officials.

VII. A MOTION TO QUASH A SUBPOENA IS A PROPER VEHICLE FOR CHALLENGING THE AUTHORITY OF THE INDEPENDENT COUNSEL.

Appellant asserts that the recipient of a grand jury subpoena may not challenge the authority of the prosecutor to cause issuance of the subpoena but instead must comply with the subpoena. Like every other court of appeals that has addressed this issue, the court below rejected this argument. It held that "a witness who has been subpoenaed by an independent counsel may obtain judicial review of the constitutionality" of the statute purportedly authorizing the conduct of the independent counsel. J.S. 9a n.6. The court also held that appellant had waived this argument by her failure to raise it in the district court. *Id.* Both rulings of the court of appeals were correct.

At the outset, appellant's argument ignores the nature of the power whose unauthorized exercise she advocates. By causing issuance of a subpoena, filling it in, and seeking to enforce compliance with it, government officials invoke their most coercive powers. They threaten to deprive citizens of their liberty in order to compel them to act against their will, and to deprive them of their liberty if they refuse. For this reason, the lower courts uniformly have sought to assure that only properly authorized and supervised persons are permitted to exercise such enormous power. Under any articulation of a ripeness standard, the direct, imminent, and coercive impact of a subpoena squarely puts to the test the authority of the government officers involved.[47]

Not surprisingly, such challenges are expressly authorized both by the Federal Rules of Criminal Procedure

[47] Appellant's analogy to civil actions seeking declaratory and injunctive relief from unauthorized prosecutions is misplaced. Brief for Appellant at 27 n.26. Regardless of whether the burden of suffering through a criminal investigation constitutes immediate and cognizable injury, there never has been any claim that an exercise of the coercive power of the state does not constitute such injury to the party coerced.

and statute. First, Rule 17(c), Fed. R. Crim. P., provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." Compelled compliance with a subpoena caused to be issued, filled in, and enforced by an improper and unauthorized person is both unreasonable and oppressive. For this reason, district courts routinely have considered, on motions to quash, the lawful authority of Officers exercising coercive power.

Until now, this issue principally had arisen in a series of cases in which subpoenaed witnesses challenged the authority of a special government attorney to cause issuance of a subpoena. Those witnesses argued that the government attorney's appointment did not comply with the statutory requirements for appointment of special attorneys. In ruling on the merits of those claims, courts uniformly either expressly or impliedly held that such challenges are ripe for adjudication. As one court held: "Unauthorized parties cannot, and should not, be permitted to compel the attendance of prospective witnesses before a federal grand jury. Motions to quash grand jury subpoenas which have been issued pursuant to applications filed by an allegedly unauthorized government official cannot, therefore, be considered premature." *In re Grand Jury Subpoena (Patriarca)*, 396 F. Supp. 859, 863 (D.R.I. 1975).[48] A contrary ruling would represent a radical reversal of existing practice.

Second, 28 U.S.C. § 1826 authorizes a court to confine a witness who "refuses *without just cause shown* to comply with an order of the court to testify or provide other information. . . ." (emphasis supplied). An individual has "just cause" to refuse to comply with the purported

[48] *See also In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirolomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975); *In re April 1977 Grand Jury Subpoena (General Motors Corp.)*, 573 F.2d 936 (6th Cir.), *appeal dismissed en banc*, 584 F.2d 1366 (1978), *cert. denied*, 440 U.S. 934 (1979); *In re Grand Jury Proceedings/Subpoenas*, 593 F. Supp. 92 (S.D. Fla. 1984); *In re DiPiero*, 394 F. Supp. 1350 (E.D. Pa. 1975).

exercise of government authority by people who have no right to exercise that authority. Judicial supervision is essential to assure that only properly authorized persons are permitted to exercise coercive power.

Appellant nonetheless imputes a talismanic quality to the fact that this case arises in the context of a grand jury investigation. She argues that a witness called before the grand jury cannot be permitted to "interfere with the functioning of the grand jury," Brief for Appellant at 25, and that the claim is not "forever lost" because an indicted defendant could raise it (even if an unindicted target or a witness would have lost it forever). *Id.* at 27. Thus, in her view, grand jury witnesses such as appellees Schmults and Dinkins (as opposed to grand jury targets) may be coerced by a person without any lawful authority into testifying or producing documents, on pain of incarceration for any failure to do so, without any recourse ever.

For this extraordinary contention, appellant relies on an unprecedented expansion of *Blair* v. *United States*, 250 U.S. 273 (1919). *Blair* held that a witness could not object to a grand jury subpoena by asserting the unconstitutionality of a statute that he speculated was the basis of the grand jury's investigation. This Court reasoned that a witness "is not entitled to set limits to the investigation that the grand jury may conduct." *Id.* at 282. The "question whether the facts show a case within [the grand jury's] jurisdiction" and, if so, the "precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282-83 (citation omitted). It is purely speculative for a witness to anticipate answers to these questions by attacking a statute that might never be invoked against him. Instead, according to *Blair*, he must wait until the statute actually operates against him before challenging its legality.

A challenge to the lawful authority of a prosecutor to cause issuance of a subpoena is an entirely different

matter. The statute purporting to authorize appellant to cause issuance of subpoenas and compel compliance with them operates against the recipient of a subpoena as soon as the subpoena is received. Far from being speculative, the impact of the statute on the witness is immediate and concrete. Moreover, if the statute authorizing her conduct is unconstitutional, the prosecutor has no lawful authority to cause issuance of a subpoena, and the witness would receive the relief sought. There would be no way to compel compliance with the subpoena. *Blair* simply has no application in this context.

This Court's cases do not command lower courts to maintain an absolute hands-off policy toward the grand jury. For example, *United States* v. *Calandra*, 414 U.S. 338 (1974), which addressed Rule 17(c), established that when a subpoena would invade a legitimate privacy interest or otherwise appear unreasonable, "[j]udicial supervision is properly exercised in such cases to prevent the wrong *before* it occurs." *Id.* at 346 & n.4 (emphasis supplied). Similarly, in *United States* v. *Dionisio*, 410 U.S. 1, 11-12 (1973), this Court cautioned against deference of the kind appellant advocates, admonishing lower courts to protect against unconstitutional exercises of power in the grand jury context: "This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. . . . Grand juries are subject to judicial control and subpoenas to motions to quash." *See also Gravel* v. *United States*, 408 U.S. 606 (1972) (court has authority to rule on motion to quash and regulate grand jury to prevent Speech or Debate Clause violation).

In short, the decision to address appellees' constitutional claim is absolutely consistent with case law in this Court, is the uniform practice among the lower federal courts, and is correct.[49]

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[49] In any event, as the court of appeals ruled (at J.S. 9a n.6), appellant has waived this claim. She concedes that she did not question the procedural posture of this proceeding until the case

CONCLUSION

For the numerous reasons stated, the judgment should be affirmed.

Respectfully submitted,

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was in the court of appeals. The court of appeals correctly ruled that the procedural issue was not jurisdictional and that it had been waived by appellant's failure to raise it in a timely manner.

Appellant argues, however, that "issues of ripeness and standing implicate Article III's requirement of a 'Case or Controversy,' or prudential concerns for the avoidance of unnecessary constitutional decisions." Brief for Appellant at 28-29 (citations omitted). She then concludes that "such questions [as ripeness or standing] may not be 'waived.'" *Id.* at 29. This is a *non sequitur*. Only if the "prudential concerns" about ripeness affect the court's Article III power may they not be waived, but appellant, far from arguing that prudential concerns about ripeness affect a court's Article III jurisdiction, *distinguishes* prudential concerns from Article III requirements. For support, she cites cases involving standing. At bottom, appellant offers no reason to reject the court of appeals' conclusion that it had no duty to address the claim appellant belatedly raised.